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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THORPE INSULATION COMPANY,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CENTURY INDEMNITY COMPANY,<br><br>Defendant and Appellant. | B197747<br><br>(Los Angeles County<br>Super. Ct. No. JCCP 4458) |

APPEAL from an order of the Superior Court of Los Angeles County, Carolyn B. Kuhl, Judge. Reversed and remanded.

O'Melveny & Myers, Richard B. Goetz, Paul G. McNamara, Steven H. Bergman and Cynthia A. Merrill; White & Williams and Patricia B. Santelle for Defendant and Appellant.

Morgan, Lewis & Bockius, Michel Y. Horton, Charles J. Malaret and Thomas M. Peterson for Plaintiff and Respondent.

Thorpe Insulation Company ("Thorpe") was a manufacturer and installer of asbestos-containing products. Several asbestos producers and insurers of those producers signed an agreement to collectively administer asbestos claims (the "Wellington Agreement"); Thorpe was a signatory. Under the Wellington Agreement, signatory asbestos producers agreed to arbitrate disputes with any of their insurers that had also signed the agreement. Thorpe subsequently brought suit against numerous insurers. One such insurer, Century Indemnity Company, the successor in interest to California Union Insurance Company ("Cal Union") sought to compel arbitration under the Wellington Agreement, on the basis that it, too, was a Wellington signatory. Cal Union had not *itself* executed the Wellington Agreement; instead, it considered itself a party to the Wellington Agreement because the agreement had been executed on behalf of the "Cigna[1] Property & Casualty Insurance Companies," of which it was one. The trial court denied the motion to compel on the basis that Cal Union had failed to establish that it was a signatory to the Wellington Agreement. We reverse.

## *FACTUAL AND PROCEDURAL BACKGROUND*

According to the complaint, Thorpe "is a California company that installed, repaired, maintained, removed and displaced asbestos materials at industrial facilities. It has been subject to thousands of asbestos bodily injury lawsuits resulting from these historical operations." In the asbestos suits, the underlying plaintiffs "seek . . . recovery

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[1] The Wellington Agreement was signed with lower-case letters; generally CIGNA is referred to in all-capital letters. There is no argument that the use of lower-case letters was meant to refer to anything other than CIGNA.

of damages from Thorpe resulting from their alleged injurious exposure to asbestos at industrial facilities serviced by Thorpe. The [underlying] plaintiffs seek recovery against Thorpe on various theories of recovery, including premises liability, negligence, and failure to warn." Thorpe submitted the asbestos claims to its insurers.

1. *The Wellington Agreement*

Thorpe and its carriers were involved in many disputes regarding coverage for the asbestos claims. Such disputes were not unique to Thorpe and its insurers, but were, in fact, occurring throughout the country between other asbestos producers and their insurers. "A large part of this industry-wide litigation was ended when a number of parties reached a negotiated settlement, commonly referred to as the Wellington Agreement. This accord, signed in 1985 by numerous manufacturers and their insurers . . . resolved persistent contribution and indemnity issues, thereby allowing for joint representation in thousands of pending asbestos-related lawsuits. The Wellington Agreement provided for the creation of the Asbestos Claims Facility to analyze, defend, and settle pending and future asbestos-related bodily injury claims referred to it by participating former asbestos producers. Under the agreement, funding for the payment of settlements, judgments, and legal expenses incurred in the defense of asbestos-related bodily injury claims against the party-producers was provided by the party-insurers." (*In re National Gypsum Company* (5th Cir. 2000) 208 F.3d 498, 502.)

The Wellington Agreement contains an arbitration clause, requiring all subscribing producers and insurers to resolve their disputes pursuant to a several-stage

alternative dispute resolution ("ADR") process, culminating in arbitration.[2] The parties to the Wellington Agreement further agree to forgo claims for declaratory relief or damages against each other with respect to the application of insurance to asbestos claims within the scope of the agreement.

The Wellington Agreement is dated June 19, 1985. Any asbestos producer or insurer could become a signatory to the Wellington Agreement by signing it on or before that date.[3] Before signing, a producer was required to offer participation in the Wellington Agreement to all of its insurers, while an insurer was required to offer participation to all of its producers. The Wellington Agreement provided that it may be executed "in any number of counterparts and by different signatories . . . in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement." In other words, there was no requirement that an asbestos producer and its insurers execute the same copy of the Wellington Agreement; indeed, a producer and an insurer would be

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[2] The parties use the term "Wellington arbitration," but it is not always clear if the term is meant to refer to the entire ADR process contemplated by the Wellington Agreement, or only the arbitration itself. At one point, Thorpe argued that even if Cal Union were entitled to Wellington ADR, it could not demand arbitration without first seeking negotiation, the first step of Wellington ADR. Thorpe does not pursue this argument on appeal. Thus, there is no practical difference between Wellington ADR and Wellington arbitration with respect to this appeal.

[3] Under the Wellington Agreement a "[s]ubscribing" insurer or producer was one which had become a signatory to the agreement. We therefore use the terms "subscribing" and "signatory" interchangeably.

considered signatories if they each executed the agreement on or before June 19, 1985, regardless of their knowledge of the identity of other signatories.

Producers and insurers that had not signed the Wellington Agreement by June 19, 1985 were permitted to join the agreement later. However, they could do so only on application to, and approval by, the board of directors of the Asbestos Claims Facility. Moreover, the specific provisions of the Wellington Agreement governing claims handling, including the arbitration clause, would not apply between any late signatory to the agreement and its respective signatory producers or insurers without the express written consent of those signatory producers or insurers.

Pursuant to the Wellington Agreement, liability payments on claims handled by the Asbestos Claims Facility would be allocated among the signatory producers by a formula. In turn, payments allocated to each individual subscribing producer would be allocated among that producer's subscribing insurers. However, it was not necessarily the case that every subscribing insurer which had ever written a policy for a specific subscribing producer would be responsible for a share of payments allocated to that producer. Instead, the subscribing producers were required to identify *which* of their policies would initially be responsible for payments on Wellington claims. Specifically, each Wellington producer was required to identify an initial "coverage block," consisting of all policies issued to that producer by subscribing insurers effective prior to a date chosen by the producer.[4] The date was required, however, to be

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[4] The coverage block would not begin prior to the date of the producer's first involvement with asbestos.

between January 1, 1973 and December 31, 1979. A producer could later add subsequent policies, but could only do so consecutively.

There is a reason a subscribing producer might choose to limit its initial coverage block. Not all insurers signed the Wellington Agreement, so gaps in coverage could exist between policies in the coverage block. Under the agreement, "[w]henever a Subscribing Producer has an insurance policy issued to it for a particular period within the coverage block by an Insurer that is not a signatory hereto, such Producer shall use its reasonable best efforts, including, if necessary, the timely pursuit of litigation, to obtain a final and reasonable settlement agreement or final judicial determination concerning the application of such insurance policy to asbestos-related claims." While the subscribing insurers agreed to make gap-filling payments to cover the share allocable to non-signatory insurers, the subscribing insurers were entitled to reimbursement when the subscribing producer successfully pursued the non-subscribing insurers. Further, as an incentive to encourage signatory producers to pursue the non-signatory insurers, the Wellington agreement charges interest to producers on payments made by signatory insurers to fill the gap created by non-signatory insurers. (*In re National Gypsum Company*, *supra*, 208 F.3d at p. 502.)

Thorpe executed a copy of the Wellington Agreement on June 19, 1985. The agreement was signed by Robert Fults, Thorpe's president. Thorpe chose to end its initial coverage block on February 1, 1979. This period included only two subscribing insurers, Harbor Insurance Company ("Harbor") and Fireman's Fund Insurance Company ("Fireman's Fund"). According to Thorpe's complete schedules of insurance,

Fireman's Fund and Harbor provided an unbroken period of coverage from 1952 through February 1, 1979. Thereafter, Thorpe had been insured by Puritan from February 1, 1979 through October 1, 1979. Puritan was apparently *not* a signatory to the Wellington Agreement. After the Puritan policy, Thorpe had been insured by Cal Union from October 1, 1979 through October 1, 1980. As we will discuss later, evidence indicates that Thorpe chose not to include Cal Union in its coverage block because Puritan was not a signatory, and including Cal Union would have created a coverage gap, requiring Thorpe to pursue Puritan.

The issue in this appeal, however, is whether Cal Union was an initial signatory to the Wellington Agreement, which would require Thorpe to arbitrate its current coverage dispute with Cal Union. On June 19, 1985, James McMahon signed the Wellington Agreement on behalf of "Cigna Property & Casualty Insurance Companies." The relationship between CIGNA Corporation and Cal Union is somewhat complex, but it cannot be disputed that, at the time McMahon executed the Wellington Agreement, Cal Union was an indirect subsidiary of the CIGNA Corporation.[5] CIGNA Corporation organized its indirect subsidiaries into a number of groups, one of which was the Property & Casualty Group, which was comprised of its property and casualty insurance

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[5] Specifically, CIGNA Corporation's 10-K filings for 1984 and 1985 indicate that Cal Union was a subsidiary of Indemnity Insurance Company of North America, which was, in turn, a subsidiary of Insurance Company of North America. This latter entity was a subsidiary of INA Financial Corporation, which was itself a subsidiary of INA Corporation. INA Corporation was a subsidiary of CIGNA Holdings, Inc., which was a subsidiary of CIGNA Corporation.

companies, including Cal Union. CIGNA had a Major Claims Unit, located at its home office, which was responsible for, among other things, the management and handling of asbestos claims and overseeing asbestos-related liability for all of the CIGNA property and casualty insurance companies. McMahon was Vice President and head of the Major Claims Unit. He was involved in negotiating the Wellington Agreement as the principal negotiator for the CIGNA property and casualty insurance companies. He signed the Wellington Agreement on behalf of the "C[IGNA] Property & Casualty Insurance Companies."

Immediately after execution of the Wellington Agreement, the Asbestos Claims Facility did not yet exist. Attorney Mitchell F. Dolin of Covington and Burling served as the de facto secretary for the yet-to-be-formed facility, and therefore served as the document repository for the signature pages of the Wellington Agreement. On November 20, 1985, McMahon wrote Attorney Dolin to identify the insurance companies "represented by the CIGNA Property and Casualty Insurance Companies." McMahon identified six such companies, including Cal Union. He noted that Attorney Dolin had created a draft membership list with respect to the Wellington Agreement, and suggested these companies be added to it.

2. *The 1995 Action*

The next occurrence with relevance to the instant dispute is a January 1995 lawsuit Thorpe filed against several of its insurers, including Cal Union, and the two

insurers in Thorpe's initial coverage block, Fireman's Fund, and Harbor.[6] That action alleged that, in 1984, Thorpe entered into a claims handling agreement (different from the Wellington Agreement) with several of its insurers, including, among others, Cal Union, Fireman's Fund, and Harbor. This agreement apparently provided for arbitration before the American Arbitration Association ("AAA"). A coverage dispute arose, the details of which are irrelevant to this appeal. In November 1993, Thorpe initiated a Wellington arbitration against Fireman's Fund and Harbor, in order to resolve the dispute. In December 1984, Fireman's Fund, Harbor, Cal Union, and other insurers instituted a AAA arbitration against Thorpe, raising similar issues. Both arbitrations were placed in abeyance pending settlement negotiations. In October 1994, the carriers attempted to proceed with the AAA arbitration. Thorpe brought the 1995 action seeking, among other things, a declaration that Fireman's Fund and Harbor were *required* by the Wellington Agreement to proceed with the Wellington arbitration, and, further, that the Wellington arbitration should proceed before the AAA arbitration.[7]

Each party in the instant dispute relies on actions taken by the opposing party in the course of the 1995 action. Thorpe, which argues that Cal Union was not a party to the Wellington Agreement, notes that, at no time during the course of the 1995 action

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[6] Harbor and Cal Union were both sued under different names. We use the original names for clarity.

[7] The record does not indicate the disposition of this action, although, at one point, Cal Union's counsel represented that Thorpe's assertion that the Wellington arbitration takes precedence was "successfully asserted."

did Cal Union attempt to join the Wellington arbitration, or even argue that it was entitled to notice (as a Wellington signatory) of the then-pending Wellington arbitration. Cal Union, which argues that it was a Wellington signatory, relies on deposition testimony of Fults taken in connection with the Wellington arbitration at issue in the 1995 action, in which Fults testified that: (1) Cal Union had "also joined Wellington"; (2) Thorpe had the option of including Cal Union in its initial coverage block; and (3) Thorpe chose not to do so because the insurer between Harbor and Cal Union was not a Wellington signatory and would have created a coverage gap.

3. *The Instant Action*

On November 14, 2005, Thorpe brought the instant action against many of its insurers, including Cal Union.[8] The complaint seeks declaratory relief regarding certain asbestos coverage disputes. Cal Union immediately wrote Thorpe, alerting Thorpe that it was a Wellington signatory ("as one of the CIGNA Property and Casualty Companies") and seeking Wellington arbitration in lieu of litigation.

Thorpe responded, arguing that Fireman's Fund and Harbor were the only Wellington subscribing insurers *with respect to Thorpe*. As Thorpe had not included Cal Union in its coverage block, Thorpe took the position that Cal Union was not a Wellington subscriber "as to Thorpe," and was therefore not entitled to Wellington arbitration of the instant dispute. Further letters were sent, but no resolution of the issue

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[8] Thorpe did not name Fireman's Fund and Harbor in the instant action.

was reached. Eventually, Cal Union attempted to initiate Wellington ADR, by paying the necessary fees on behalf of itself and Thorpe.

On February 8, 2006, Thorpe filed a motion for a preliminary injunction, seeking to enjoin Cal Union from proceeding with Wellington ADR. The motion was based on the theory that Cal Union was a Wellington signatory "as a general matter," but was not a Wellington signatory "as to Thorpe." Thorpe argued that there was a *specific* Wellington Agreement "to which Thorpe is a signatory," which includes *only* those of its insurers it had included in its coverage block. Believing that Thorpe's decision to exclude Cal Union from its coverage block was controlling, Thorpe relied on Fults's deposition testimony from the 1995 Wellington Arbitration. Thorpe's motion explained, "Fults testified in response to insurer counsel's question that Thorpe neither intended, nor desired, to include Cal Union in its version of the Wellington Agreement, even though Cal Union, as a general matter, was a Wellington insurer."

Cal Union opposed the preliminary injunction motion, and also filed a cross-motion to compel Wellington arbitration. Cal Union argued that there is only a single Wellington Agreement to which both Cal Union and Thorpe were signatories. Cal Union argued that whether Thorpe chose to include Cal Union in its coverage block was wholly irrelevant; the fact that they had both signed the Wellington Agreement ended the matter and required Wellington arbitration. Cal Union submitted the declaration of McMahon indicating that he had signed the Wellington Agreement on behalf of all CIGNA property and casualty insurance companies, including Cal Union.

In Thorpe's reply memorandum in support of its preliminary injunction motion, Thorpe again argued that Cal Union had not been a party to *Thorpe's* Wellington Agreement. Thorpe also added an argument that Cal Union was not a signatory to *any* Wellington Agreement, on the basis that McMahon had signed the Wellington Agreement on behalf of "CIGNA Property and Casualty Insurance *Company*," which Thorpe (wrongly) asserted to be a subsidiary of CIGNA corporation, and a sister corporation to Cal Union. Thorpe argued, "since apparently neither is the parent or successor in interest to the other, Cal Union cannot claim to be a Wellington Subscribing Insurer merely because CIGNA Property and Casualty Insurance Company is. Cal Union fails to demonstrate how a sister company's signature is binding on Thorpe." This argument is in direct contrast to Thorpe's admission, in its preliminary injunction motion, that "Cal Union, as a general matter, was a Wellington insurer." Moreover, it completely disregards the undisputed evidence that McMahon signed on behalf of "Cigna Property & Casualty Insurance *Companies*," not a single company entitled "Cigna Property & Casualty Insurance Company."

On October 5, 2006, a hearing was held on both motions. The trial court indicated a tentative intention to deny arbitration, on the basis that there is no admissible evidence of the corporate relationship between Cal Union and the Wellington signatory on which it relied. The trial court sought *objective* evidence of the corporate relationship, not merely the subjective intent of the individual who had signed the Wellington Agreement. Counsel for Cal Union offered to submit to the court CIGNA's 10-K filings which would objectively establish the corporate relationship and

demonstrate that Cal Union was a CIGNA property and casualty insurance company. Cal Union explained that it had never thought this was an issue in the case because Fults had admitted Cal Union was a Wellington signatory, and had simply argued that Cal Union had not signed *Thorpe's version* of the Wellington Agreement.[9]

The court then asked to hear from Thorpe. Thorpe's counsel argued, for the first time, that when Fults testified at deposition that Cal Union had been a Wellington signatory, Fults had *meant* that Cal Union may have become a Wellington signatory *after* June 19, 1985 – perhaps by means of McMahon's November 20, 1985 clarifying letter to Attorney Dolin – which meant that the claims provisions and arbitration clause would not apply between Cal Union and Thorpe unless Thorpe had consented, which it had not.[10]

The trial court declined Cal Union's offer to take judicial notice of CIGNA's 10-K filings to establish the corporate relationship. Instead, the court directed that the two pending motions be taken off calendar and that Cal Union submit a new petition to

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[9] When counsel for Cal Union explained that Cal Union did not think the signatory's authority to bind Cal Union had been in issue due to Thorpe's admission in its moving papers that Cal Union was a Wellington signatory, the court stated, "probably by the time of the reply brief on the petition to compel it was an issue." We agree that the issue was first raised in Thorpe's reply papers; this explains why Cal Union did not offer CIGNA's 10-K filings prior to the hearing.

[10] When the court asked counsel for Thorpe if this argument had been in Thorpe's papers, counsel replied, "it was in our papers that there was no evidence of the June 19, 1985 signature by Cal Union." It is apparent to us, however, that Thorpe had *never* argued in its papers that Cal Union became a signatory to the Wellington Agreement *after* June 19, 1985.

compel arbitration, establishing by objective evidence that Cal Union was bound by the signature of "Cigna Property & Casualty Insurance Companies."

On November 14, 2006, Cal Union filed the motion as directed. Cal Union supported its motion with CIGNA's 10-K filings, indicating that Cal Union was an indirect subsidiary of CIGNA Corporation. The documents were submitted as exhibits to the declaration of CIGNA Corporation's corporate secretary, Robert Robinson. Robinson testified as to the corporate structure of CIGNA and its subsidiaries. Specifically, he testified that CIGNA organizes its indirect subsidiaries into groups, including the Property and Casualty Group, of which Cal Union was a part.[11] Cal Union also reasserted its argument that Fults had previously admitted that Cal Union was a Wellington signatory.

In opposition, Thorpe argued that McMahon had signed the Wellington Agreement "on behalf of a generic phrase, which Cal Union now claims was meant to include Cal Union. Thorpe did not have any knowledge that McMahon's signature was as an agent of Cal Union. And, nowhere in the voluminous corporate records Cal Union has produced in connection with its motion, does Cal Union explain how McMahon had authority to bind Cal Union, or how Thorpe was informed of such authority." Thorpe further argued that, at most, Cal Union attempted to become a Wellington signatory on November 20, 1985, by means of McMahon's letter to Attorney Dolin, which would have required Thorpe's consent. Thorpe also argued that Cal Union had waived the

right to Wellington arbitration by "behaving for the past twenty years as if Cal Union were not a Wellington signatory as to Thorpe," specifically focusing on Cal Union's conduct in Thorpe's 1995 action. Finally, Thorpe argued that the court should exercise its discretion under Code of Civil Procedure section 1281.2, subdivision (c) to deny arbitration on the basis that the instant action raises the same coverage issues against numerous insurers who are *not* signatories to the Wellington Agreement, and allowing Cal Union to resolve the issues by means of Wellington arbitration would risk conflicting rulings.

In order to ameliorate the effects of Fults's prior deposition admission that Cal Union was a Wellington signatory, Thorpe submitted a new declaration from Fults. Fults explained that, to his knowledge, Cal Union was not a signatory to the Wellington Agreement on June 19, 1985, and he did not consent to Cal Union's addition after that date. He stated, "As I testified under oath on September 14, 1995, Thorpe chose not to include the Cal Union policy within its Wellington Agreement coverage block. . . . [¶] When I signed the Wellington Agreement on behalf of Thorpe, I only knew that Fireman's Fund . . . and Harbor . . . were also signatories to the Wellington Agreement. I learned later that Cal Union became a signatory to certain producers (which I testified to at my deposition on September 14, 1995), but Thorpe never consented to Cal Union being a Wellington signatory as to Thorpe, which I understand was Thorpe's right under the Wellington Agreement."

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[11] Indeed, Robinson declared that, in 1987, he became Senior Vice President and General Counsel of the CIGNA Property and Casualty Group.

A hearing was held on December 14, 2006. The trial court indicated its tentative decision was to deny the motion to compel, on the basis that Cal Union had failed to establish, by objective evidence, "that a signature for an entity stated as 'C[IGNA] Property & Casualty Insurance Companies,' is a signature for Cal Union." The court again indicated that McMahon's unstated intent at the time of contracting is irrelevant. Concluding that any ambiguity in the meaning of "C[IGNA] Property & Casualty Insurance Companies" was caused by McMahon, the court construed the ambiguity against Cal Union.

Counsel for Cal Union argued that "C[IGNA] Property & Casualty Insurance Companies" is not an *entity*, but a descriptive term which includes all CIGNA subsidiaries that are property and casualty insurance companies. Cal Union further argued that the corporate documents indicate, as an undisputed, objectively-verifiable fact, that the descriptive term includes Cal Union. Cal Union argued that, given these facts, there would have been no way Cal Union could have resisted a motion to compel Wellington arbitration, had such a motion been brought against it.[12] Counsel also

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[12] At one point, the court stated, "If I had a document that showed me, as a matter of corporate structure, that Cal Union was part of a subsidiary of CIGNA Property and Casualty Insurance Companies, there would be no question." Cal Union responded that the documents establish that Cal Union was a subsidiary of CIGNA corporation and was a property and casualty insurance company. The court then asked, "You mean it wasn't intended to reference an entity structure? It was intended to be somehow descriptive?" Cal Union agreed, and argued that the designation was absolutely clear. The court stated, "You could have used the name of a corporate entity; of an actual corporate entity." Cal Union responded, "You could have done that, but this is a shorthand for all the corporate entities that are part of the CIGNA companies." The court rejoined, "Well, in CIGNA's mind that may be the case."

argued that since Fults had testified that he *chose* not to include Cal Union in Thorpe's coverage block, Thorpe was necessarily aware, from the beginning, that Cal Union was a Wellington signatory.

At one point, while Cal Union's counsel was arguing that the Wellington signatory "C[IGNA] Property & Casualty Insurance Companies" could objectively be determined to include Cal Union, counsel indicated that he had "a lot of other issues – if your honor wants to hear them – to address, but we have to get over this issue –." The court agreed that Cal Union had "to get over this issue."

Ultimately, without hearing argument on any other issues, the court denied the motion to compel arbitration. No statement of decision was requested; the minute order indicates the motion was denied "[f]or the reasons stated on the record." Cal Union filed a timely notice of appeal.

***CONTENTIONS OF THE PARTIES***

On appeal, Cal Union contends the court erred in denying the motion to compel arbitration. Specifically, Cal Union argues that its evidence unambiguously demonstrated that it was one of the CIGNA property & casualty insurance companies bound to the Wellington Agreement by McMahon's signature. Thorpe contends that the court's order denying the motion to compel must be upheld. It argues that substantial evidence supports the conclusion that McMahon's signature did not bind Cal Union to the Wellington Agreement. Specifically, Thorpe argues that "C[IGNA] Property & Casualty Insurance Companies" was an unincorporated association that could not bind its members, and that McMahon was not otherwise Cal Union's agent for the purpose of

signing the Wellington Agreement. Thorpe further argues that Cal Union's conduct with respect to the 1995 action shows that Cal Union was not a signatory to the Wellington agreement. Finally, Thorpe argues that the court's order may be affirmed as an exercise of its discretion under Code of Civil Procedure section 1281.2, subdivision (c).

## ***DISCUSSION***

1. *Standard of Review*

" 'The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]' [Citation.] [¶] ' "We will uphold the trial court's resolution of disputed facts if supported by substantial evidence. [Citation.] Where, however, there is no disputed extrinsic evidence considered by the trial court, we will review its arbitrability decision de novo." [Citation.]' " (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1282.)

2. *Undisputed Evidence Establishes Cal Union Was a Wellington Signatory as of June 19, 1985*

This much is undisputed: (1) McMahon signed the Wellington Agreement on June 19, 1985; (2) McMahon signed the Wellington Agreement on behalf of "Cigna Property & Casualty Insurance Companies"; (3) "CIGNA Property & Casualty

Insurance Companies" is not an independent legal entity; (4) CIGNA Corporation organizes its indirect subsidiaries into groups; its indirect subsidiaries that are property and casualty insurance companies constitute the CIGNA Property & Casualty Insurance Group; (5) Cal Union is an indirect subsidiary of CIGNA Corporation; (6) Cal Union is a property and casualty insurer; and (7) Cal Union is a member of the CIGNA Property & Casualty Insurance Group. From these facts, the conclusion follows that Cal Union can unambiguously be described as a CIGNA property and casualty insurance company. As the Wellington Agreement was executed on behalf of the "C[IGNA] Property & Casualty Insurance Companies," it appears incontrovertible that Cal Union was a Wellington signatory.

Thorpe does not question the factual conclusion that Cal Union is a CIGNA property and casualty insurance company. Instead, Thorpe suggests that a signature on behalf of the "C[IGNA] Property & Casualty Insurance Companies" cannot, of itself, bind each CIGNA property and casualty insurance company. Thorpe relies on authority suggesting that the signature of a parent corporation cannot bind a subsidiary corporation *merely* because the parent owns all of the subsidiary's stock (*Whetstone Candy Company, Inc. v. Kraft Foods, Inc.* (11th Cir. 2003) 351 F.3d 1067, 1074) and that an unincorporated association cannot bind each of its members based *solely* on their membership (*Hann v. Nored* (Or. 1963) 378 P.2d 569, 575). Even if these non-California authorities were binding in California, they are wholly distinguishable. Thorpe overlooks that the issue is ultimately one of *intent*. We are not here concerned with an argument that Cal Union is bound to an agreement it had no intention of joining

simply due to the formalities of corporate structure or a quirk of membership in an association. Cal Union is bound because CIGNA Corporation has chosen to consolidate the claims handling operations for all of its property and casualty insurance companies in a single group. Management of asbestos claims, in particular, was consolidated, and all CIGNA property and casualty insurance companies collectively negotiated and joined the Wellington Agreement through McMahon's signature.

Thorpe relies on the fact that Cal Union did not establish, *through a document signed by a Cal Union employee*, that McMahon was appointed its agent for the purposes of the Wellington Agreement. This is not a matter of Thorpe's concern. "One who contracts with an agent or officer of, and acting for, a corporation generally cannot question his authority to bind the corporation. [Citation.] This is a general rule of agency. [Citation.] If an agent exceeds his authority his principal may complain but a third party may not. [The corporate defendant] had the right to affirm or repudiate the acts of its [agent]. It did not disaffirm them and plaintiff may not take unto himself the right to do so." (*Boteler v. Conway* (1936) 13 Cal.App.2d 79, 83. See also *Flash Cleaners v. Columbia Appliance* (1957) 156 Cal.App.2d 455, 458 [holding "one dealing with a corporation's agent cannot question the agent's authority"].) Here, Cal Union did not repudiate McMahon's agency; it is Cal Union that is relying on McMahon's agency by seeking Wellington arbitration. (See *Navrides v. Zurich Ins. Co.* (1971) 5 Cal.3d 698, 704 [holding that a principal may ratify the unauthorized act of an agent by bringing suit based thereon]; *Alvarado Community Hospital v. Superior Court* (1985) 173 Cal.App.3d 476, 482 [same].) Cal Union need not produce a declaration from a

Cal Union employee to confirm that McMahon acted as its agent when Cal Union's entire litigation position is based upon that premise.

Finally, we cannot disregard Fults's admission in his 1995 deposition that Cal Union was a Wellington signatory. Fults's subsequent declaration attempts to explain away the testimony by asserting that Fults had meant only that he had learned that Cal Union *later* became a Wellington signatory (which required the consent of each of Cal Union's signatory asbestos producers). Fults's deposition testimony does not easily admit of that interpretation. The relevant questions and answers are as follows:

"Q. You testified a few minutes ago, I believe, that whereas all the insurers became aware that Thorpe joined Wellington but only [two] join[ed] Wellington within the coverage block, isn't it true that one other of Thorpe's insurers besides Harbor and Fireman's Fund also joined Wellington?

"A. Yes.

"Q. And didn't Thorpe have the option of including that insurer within its coverage block?

"A. Yes.

"Q. And was that Cal Union?

"A. Yes.

"Q. And wasn't it Thorpe's choice not to?

"A. Yes.

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"Q. Earlier you were talking about the coverage blocking Wellington and Thorpe choosing not to include Cal Union, and I was just wondering why.

"A. It's an interesting question. I wish I knew the precise answer to that. There was a logic behind where we chose to put it, and it had to do with the way the numbers went together. And the relationship of full asbestos coverage was one thing I remember thinking about and the fact that they weren't going to be in Wellington, and that was going to create an additional obligation on us because they'd chosen continue to come in. [*Sic.*]

"Q. Who is 'they'?

"A. The people after Harbor. We set the date, the Harbor date.

"Q. There was a gap?

"A. There was a gap there that meant that I wasn't sure what was going to happen to it and how this whole thing would work. Nobody knew how it was all going to work. We read the words, and so you pick one."

While Fults's testimony is a bit unclear as to his rationale for not including Cal Union, it appears that Fults made his decision not to include Cal Union when identifying Thorpe's *initial* coverage block. Indeed, Fults's comment that "[n]obody knew how it was all going to work," reflects a decision that was made before Wellington was actually in operation. Moreover, Fults is very clear in his testimony that: (1) Cal Union joined Wellington; (2) Thorpe had the option to choose to include Cal Union in its coverage block; and (3) Fults chose not to do so because it would create a gap in his coverage block due to the non-signatory status of the insurer between

Harbor and Cal Union. Fults's subsequent declaration that he had testified at deposition that he had "learned [after signing Wellington] that Cal Union became a signatory to certain producers" is, at best, an overstatement and, at worst, revisionist history which can be completely disregarded.[13] (*Jacobs v. Fire Ins. Exchange* (1995) 36 Cal.App.4th 1258, 1270.)

In short, the undisputed evidence indicates that Cal Union was a CIGNA property and casualty insurance company that was bound by McMahon's signature on behalf of all CIGNA property and casualty insurance companies. Moreover, Thorpe knew and admitted that Cal Union was a Wellington signatory.

3. *Cal Union's Conduct in 1995 is No Bar*

Thorpe next argues that Cal Union's conduct in connection with Thorpe's 1995 action constitutes substantial evidence that Cal Union was not a Wellington signatory. Specifically, Thorpe notes that Cal Union was aware that Thorpe had brought a Wellington arbitration against Fireman's Fund and Harbor, yet Cal Union failed to join that Wellington arbitration, and instead pursued a AAA arbitration against Thorpe

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[13] We set forth the procedural history of this case at length above. Thorpe initially took the position that Cal Union could not compel arbitration unless Cal Union *had been identified by Thorpe in its coverage block*; Thorpe, therefore, freely admitted that Fults had testified that "Cal Union, as a general matter, was a Wellington insurer." Upon realizing that, under the language of the Wellington Agreement, Thorpe would be required to arbitrate its claims against Cal Union if Cal Union "as a general matter, was a Wellington insurer," Thorpe apparently tried to backpedal from its admission and recharacterized Fults's testimony as indicating that Cal Union was only a Wellington insurer with respect to certain producers, on the unstated and unproven premise that Cal Union attempted to join the Wellington Agreement late.

pursuant to a claims handling agreement. Thorpe argues that this indicates that Cal Union knew that it was not a Wellington signatory and did not act like one. This argument is not persuasive. Cal Union brought the AAA arbitration *along with Fireman's Fund and Harbor*, two insurers which Thorpe concedes were Wellington signatories. The dispute in the 1995 action was over which form of arbitration took priority (Wellington or AAA). That Cal Union, along with two other admitted Wellington signatories, took the position that AAA arbitration should take priority over Wellington arbitration in no way indicates that Cal Union was not a Wellington signatory.

4. *The Trial Court Did Not Exercise its Discretion to Deny Arbitration Under Code of Civil Procedure Section 1281.2, subdivision (c)*

Code of Civil Procedure section 1281.2, subdivision (c) provides that a trial court may decline to compel arbitration if "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." In that situation, the court may: (1) refuse to require arbitration; (2) order the arbitration to proceed and stay the court proceedings pending its outcome; or (3) stay the arbitration pending the outcome of the court proceedings.

While Thorpe argues that the court's order denying arbitration may be upheld as a proper exercise of its discretion under Code of Civil Procedure section 1281.2, subdivision (c), it is apparent that the court did not exercise its discretion under that

statute. The court declined to hear argument on any issue other than whether Cal Union was bound by McMahon's signature on the Wellington Agreement, and its minute order indicated that the motion was denied for the reasons stated on the record. We will not uphold the court's order as a proper exercise of its discretion when it is apparent that the trial court did not so exercise its discretion. We will remand for the trial court to consider in the first instance whether it should exercise its discretion under Code of Civil Procedure section 1281.2, subdivision (c).[14]

***DISPOSITION***

The order denying Cal Union's motion to compel Wellington arbitration is reversed and the matter is remanded for further proceedings consistent with this opinion. Cal Union shall recover its costs on appeal.

***NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS***

CROSKEY, J.

WE CONCUR:

KLEIN, P. J. KITCHING, J.

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[14] We do not mean by this statement that an exercise of the court's discretion under the statute would or would not be upheld. Indeed, should the court choose to exercise its discretion, it must first determine whether Code of Civil Procedure section 1281.2 applies to the Wellington Agreement, in light of the Wellington Agreement's particular choice of law language.